

87-1602

NO. _____

Supreme Court, U.S.

FILED

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IN THE SUPREME COURT OF THE UNITED STATES
JOSEPH F. SPANIOLO, JR.
CLERK

OCTOBER TERM, 1987

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
THOMAS FULCOMER, Superintendent,
Huntingdon State Correctional Institute;
and LEROY ZIMMERMAN, Attorney General
of Pennsylvania,
Petitioners

V.

MICHAEL PEOPLES,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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68/12

QUESTIONS PRESENTED

1. Must not this Court resolve the direct decisional conflict within the Courts of Appeals created by a Third Circuit requirement that state courts violate their own rules and procedures to comply with federal habeas corpus exhaustion requirements?

2. Where state procedures are flouted and the highest state court is thereby denied a fair opportunity for review, must not a state habeas corpus applicant utilize remaining available state remedies before he may obtain federal habeas corpus review?

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NO. _____

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RONALD D. CASTILLE, District Attorney
of Philadelphia, et al.;
Petitioners

V.

MICHAEL PEOPLES,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners, Ronald D. Castille,
District Attorney of Philadelphia County,
Thomas Fulcomer, Superintendent,
Huntingdon State Correctional Institute,
and Leroy Zimmerman, Attorney General of
the Commonwealth of Pennsylvania, respect-
fully pray that a writ of certiorari issue
to review the judgment and opinion of the
United States Court of Appeals for the
Third Circuit in this matter. The opinion

was filed December 30, 1987, and rehearing was denied January 25, 1988. The Third Circuit has stayed issuance of its mandate pending resolution of the present petition.

OPINIONS BELOW

The unreported panel opinion of the Court of Appeals for the Third Circuit is reprinted in Appendix A at 1A-16A. The denial of rehearing is reprinted in Appendix B at 1B-2B, and the orders of the United States District Court for the Eastern District of Pennsylvania and the incorporated Report and Recommendation of the United States Magistrate are reprinted in Appendix C at 1C-17C.

STATEMENT OF JURISDICTION

Invoking jurisdiction under 28 U.S.C. §2254, respondent Michael Peoples brought this habeas corpus action in the Eastern District of Pennsylvania. By orders dated April 17, 1987 and April 21,

1987, the Eastern District dismissed the habeas corpus petition on exhaustion grounds. On December 30, 1987, a Third Circuit panel entered a judgment and opinion reversing the Eastern District's orders and remanding for a hearing on the merits of the habeas corpus petition. Petitioner's request for rehearing by the Court of Appeals en banc was denied on January 25, 1988. Issuance of the Third Circuit's mandate has been stayed pending decision on this petition.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §2254(b) and (c),
which provide:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant

has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

Respondent was convicted of arson-endangering persons, robbery and related charges in this 1981 case wherein the victim was dragged off a Philadelphia sidewalk, robbed and set afire. Upon conviction, respondent, represented by counsel, began a direct appeal. Post-verdict motions were filed with the state trial court, argued and denied.² The

²Post-verdict motions represent the initial stage of the appellate process
(Footnote Continued)

motions challenged, inter alia, the denial of a non-jury trial, the scope of the prosecutor's cross-examination, and the admissibility of the identification evidence. All of these claims were later raised in federal court.

Represented by new counsel, respondent appealed to the Pennsylvania Superior Court, the state's intermediate appellate court. In that court, respondent abandoned the non-jury trial issue but pursued the cross-examination and

(Footnote Continued)
under Pennsylvania law. Accordingly, any claim omitted from written post-verdict motions is waived for subsequent appellate consideration. Pa.R.Crim.P. 1123(a) (only issues contained in written post-verdict motions may be heard or argued); Pa.R.A.P. 302(a) (issues not raised in lower court may not be raised for the first time on appeal); Commonwealth v. Mitchell, 464 Pa. 117, 121-126, 346 A.2d 48 (1975) (announcing strict enforcement of appellate waiver provisions).

identification claims.³ Additionally, he raised for the first time in the Superior Court, the claim of the ineffective assistance of trial counsel, based on grounds which he later abandoned in federal court.⁴ The Superior Court

³Pennsylvania's waiver rule applies equally to claims abandoned at the intermediate appellate court level. Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1975) (claim raised in trial or sentencing court but abandoned in the intermediate appellate court is waived for Supreme Court review); accord, Sheppard v. Old Heritage Mutual Insurance Co., 492 Pa. 581, 425 A.2d 304 (1980) (failure to pursue issue on appeal is just as effective a waiver as failure to initially raise it).

⁴Under Pennsylvania law, the issue of the ineffective assistance of counsel must be raised at the first opportunity at which an accused is represented by new counsel or it is waived. Commonwealth v. Webster, 490 Pa. 322, 416 A.2d 491 (1980) (exception to rule that issues not raised in post-verdict motions will not be considered on appeal is when ineffectiveness of prior counsel is raised; but in such a case, ineffectiveness must be raised at earliest
(Footnote Continued)

affirmed the judgment of sentence.

Commonwealth v. Peoples, 319 Pa. Super.
621, 466 A.2d 720 (1983).

Respondent then sought review in the state's highest court, the Pennsylvania Supreme Court. He filed a pro se document with that court, entitled Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of New Counsel. Respondent

(Footnote Continued)

stage in proceedings at which counsel whose representation is being challenged no longer represents the accused); accord, Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977). A claim of the ineffective assistance of counsel will not be decided on direct appeal, however, unless clear and irrefutable proof of the issue appears on the face of the record. See, e.g., Commonwealth v. Cook, 230 Pa. Super. 283, 326 A.2d 461 (1974). If the record is inadequate, an appellate court may remand the case for an evidentiary hearing, Commonwealth v. Davis, 499 Pa. 282, 453 A.2d 309 (1982), or await the results of a post conviction proceeding. Commonwealth v. Cook, supra, 230 Pa. Super. at 283, 326 A.2d at 461.

requested that the court appoint new counsel to "raise and argue ineffective assistance of former trial, post-verdict and appellant (sic) counsel" (emphasis added). In addition, respondent included approximately eleven (11) claims of purported error. The claims far exceeded those raised below, in number and content, and presented most of the new claims under the rubric of ineffective assistance of counsel. The previously abandoned non-jury trial issue was resurrected.

The Supreme Court granted respondent's request for counsel and remanded the case to the trial court for the appointment of counsel "to assist petitioner in filing a petition for allowance of appeal." Counsel was appointed and timely filed a petition for allowance of appeal. The counselled petition raised the ineffective assistance of appellate counsel on two grounds raised

neither in the courts below, nor, later, in the federal habeas corpus petition. The subsequent counselled allocatur petition contained only one of the claims respondent had raised pro se. Conceding therein that the record was insufficient to permit a resolution of his claims, respondent, through counsel, also then requested a remand to the trial court for an evidentiary hearing on the ineffectiveness claims. The Supreme Court refused discretionary review.⁵

The Supreme Court's ruling opened the way for state review of respondent's claims through Pennsylvania's post conviction avenue of relief.⁶ That remedy

⁵Discretionary review in the Pennsylvania Supreme Court is analogous to certiorari review in this Court, with reasons for denials rarely given.

⁶Post-Conviction Hearing Act, 42
(Footnote Continued)

allows litigation of claims of the ineffective assistance of counsel, which have not been previously waived. Moreover, it permits the litigation of claims, apparently waived on direct appeal, where a petitioner can prove the existence of "extraordinary circumstances" justifying the failure to raise the issue, or can otherwise rebut the presumption of a "knowing and understanding" failure to

(Footnote Continued)

Pa.C.S.A. §9541, et seq. For the purposes of state post conviction litigation, the state supreme court's denial of discretionary review was not a ruling on the merits of the claims. The issues were not rendered "finally litigated" by that denial and were not barred from the state post conviction review. Pa.C.S.A. §9544(a)(1)-(3); Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 (1981) (bar to post-conviction review of claims which are finally litigated is not imposed by denial of allocatur).

raise the issue timely.⁷ Commonwealth v. Dancer, 460 Pa. 95, 331 A.2d 435 (1978).

Instead of pursuing that state remedy, however, respondent sought relief in federal court. He filed a petition for federal habeas corpus relief which alleged five bases for relief. As the Third Circuit found in its opinion, however, none of the five claims had been presented to the Pennsylvania Supreme Court in the counselled petition. The Third Circuit

⁷ Pa.C.S.A. §9543(3)(vi) (ineffective assistance of counsel is a ground for post-conviction relief). Pennsylvania's Post Conviction Hearing Act further provides that a petitioner "must prove [t]hat the error resulting in his conviction and sentence has not been ... waived." 42 Pa.C.S.A. §9543(4). "[A]n issue is waived [under the Act] if: 1) the petition knowingly and understandingly failed to raise it and it could have been raised ... on appeal ... and 2) [t]he petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue." 42 Pa.C.S.A. §9544(b).

further found that the two habeas claims of the ineffective assistance of trial counsel had been presented to the state courts only in the pro se document to the Supreme Court, and that the habeas non-jury trial claim had been abandoned at the intermediate appellate court level, being raised thereafter only in the pro se document before the state Supreme Court. Based on respondent's state appellate defaults, and because a state avenue of review was still available, the Eastern District dismissed the petition for failure to exhaust state remedies.⁸

The Third Circuit Court of Appeals reversed, based upon its ruling in Chaussard v. Fulcomer, 816 F.2d 925 (3d

⁸The District Court's dismissal orders predated the April 27, 1987 Third Circuit decision in Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir. 1987). See, text and n.9, infra.

Cir. 1987)).⁹ Thus, even though the Court found that respondent had violated state appellate procedures in the state direct appeal, and had presented ineffective assistance of counsel claims not yet ripe for appellate decision, the Third Circuit found federal habeas corpus exhaustion requirements had been satisfied simply because each of the habeas claims was contained in the pro se document to the Supreme Court.¹⁰ The Court, therefore,

⁹In Chaussard, two of the habeas claims presented to the state's highest court had been abandoned at the intermediate appellate court level. Misapplying this Court's opinion in Smith v. Digmon, 434 U.S. 332 (1978), the Third Circuit declined to attach habeas corpus significance to the state appellate default, concluding that the mere presentation of claims to a state's highest court, however improperly, will satisfy the comity-based exhaustion requirement.

¹⁰The Court reached its result even though it recognized that "the
(Footnote Continued)

remanded the case to the District Court to proceed on the merits.

Because the Third Circuit's ill-based rule intolerably intrudes on the operation of the state judiciary, and, moreover, breathes new life into forum-shopping as a viable federal habeas corpus strategy, the Commonwealth of Pennsylvania, through the named petitioners, seeks this Court's review.

(Footnote Continued)

Pennsylvania Supreme Court exercised its discretion in such a way as to avoid deciding an issue before it was presented by counsel; once a counseled petition had been filed, it would have been improper to consider the claims raised in the pro se petition but not the counseled one." Appendix 11A-12A. Constrained by Chaussard, however, the Court ruled that those state "choices" could be accorded no federal deference and would "allow a federal court to hear the merits of People's petition." Id. Apparently recognizing the unsoundness of its own result, however, the Court conceded, "Admittedly, this argument may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement... but the course charted out by Chaussard compels our decision." Id.

REASONS FOR GRANTING THE WRIT

THIS CASE PROVIDES AN IMPORTANT OPPORTUNITY TO RESOLVE A DIRECT, DECISIONAL CONFLICT AMONG THE COURTS OF APPEALS ON A COMITY ISSUE OF MAJOR IMPORTANCE WHICH HAS DISRUPTED THE UNIFORM ADMINISTRATION OF FEDERAL HABEAS CORPUS LITIGATION

Embodying a carefully-conceived balance of sovereign interests, the federal habeas corpus exhaustion doctrine requires that state courts receive a "full, fair" and genuine opportunity to review the merits of alleged constitutional violations before federal review is permitted. See, Pitchess v. Davis, 421 U.S. 482 (1975); Picard v. Connor, 404 U.S. 270 (1971). In a context not yet directly addressed by this Court, the Third Circuit has contrarily chosen, instead, to allow technical, not substantial, compliance with exhaustion requirements. The result is a direct split among

the circuits, both in policy and result. Review by this Court is essential.

If the Third Circuit's erroneous position is not corrected, an unjustifiable intrusion into state judicial proceedings will remain unremedied. If the conflict in the circuits is not resolved, contradictory habeas corpus results will proliferate. Neither result should be permitted to occur.

Unquestionably, respondent's refusal to follow reasonable state procedures denied the state courts a fair opportunity to review the merits of his habeas claims. Pennsylvania law requires claims to be raised throughout the course of an appeal for them to be reviewable by the state's highest court. Moreover, while newly-arising ineffective assistance of counsel claims must be raised in the appellate courts in order to preserve the claims, their resolution, except in rare

cases, must await development of a factual record at the trial court level.

Many of respondent's claims were, thus, procedurally unreviewable by the Supreme Court on direct review, i.e., the claims abandoned in the courts below were defaulted, the claims of the ineffective assistance of counsel were not ripe for decision for lack of factual development. Moreover, for the reasons stated above, the state Supreme Court also could not reach the merits of respondent's apparent justification for his various appellate defaults, i.e., the ineffective assistance of appellate counsel.

State litigation of respondent's habeas corpus claims, however, was not barred by the Supreme Court's disallowance

of discretionary review.¹¹ The effect of the Supreme Court's ruling was to open the

¹¹Indeed, respondent's position to the Third Circuit was that, since no procedural bar had been expressly applied by the state's highest court, the federal court could not refuse review of the merits on the ground of procedural default. The Third Circuit panel, while not ruling on the issue, seemed inclined to accept that position and, most remarkably, to regard federal review of the merits of respondent's claims as an appropriate next step. See, Appendix, 13A-14A.

The court's reliance on Klein v. Harris, 667 F.2d 274, 284-85 (2d Cir. 1981), accounts for the error in the Third Circuit's conclusion. The Second Circuit disagrees with the Third Circuit rule at issue presently, and requires that claims be presented in full accord with state procedures. See, infra at 22-24. Given the state's full opportunity to apply a procedural bar, the Second Circuit will accept only an express application of a state bar in order to preclude federal review. Such a rule is wholly inappropriate where the state is not afforded that full and fair opportunity, such as occurs, now, in the Third Circuit. The result, in the Third Circuit, is the creation of a "loophole", where none existed before, through which state review is readily bypassed at the convenience of the applicant. See, infra at 21-22, 24.

state's post-conviction remedy to respondent, for the purpose of preparing an evidentiary record, and obtaining factual findings, to determine whether the state's procedural bars should be enforced and to dispose of the ineffective assistance of counsel claims arising on appeal. Respondent declined to take that step, however; he elected, instead, to seek federal review.

The Third Circuit's erroneous grant of federal review in these circumstances ignored respondent's plainly apparent circumvention of state review. Incredibly, the windfall of federal review was granted respondent, and others like him, because of their violation of state procedures. The Third Circuit refused to defer to state court procedures; its approach can only encourage disrespect for, and violation of, those procedures.

See, Murray v. Carrier, ___ U.S. ___, 106 S.Ct. 2639 (1986).

To reach its extraordinary result, the Third Circuit wrongly relied on this Court's decision in Smith v. Digmon, supra, a case in which, contrary to the instant situation, claims were raised properly in the state system. See, Chaussard v. Fulcomer, supra, 816 F.2d at 928. Accordingly, the Third Circuit, overlooking the important policy considerations raised in cases like the present one, made the mere presentation of claims, however token, the touchstone of federal review.¹²

¹²In Chaussard, the Third Circuit treated its decision as a simple application of the rule that discretionary review has the same exhaustion consequences as an appeal as of right. Chaussard v. Fulcomer, 816 F.2d at 928.

Petitioner does not dispute the
(Footnote Continued)

Inevitably, the Third Circuit rule will promote forum-shopping as a viable appellate strategy, notwithstanding this Court's express repudiation of the practice. Murray v. Carrier, supra, 106 S.Ct. at 276 ("Nor do we agree that the possibility of 'sandbagging' vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful"). By the simple expedient of presenting designated claims in a defaulted

(Footnote Continued)
general principle that a request for discretionary review, of claims properly raised, will satisfy federal habeas corpus requirements. Petitioner's objection, however, is to the Third Circuit's conclusion that a state's adherence to its reasonable procedures is a mere act of discretion, entitled to no federal deference.

and unreviewable form to the state's highest court, an applicant may deftly deprive the state of its right to initial review and obtain federal review. Review in such circumstances is unaided by state factual findings or pertinent explication of its law. This Court must not permit fundamental state interests to be defeated by such transparency.

The other circuits, seven (7) in all, which have addressed the identical question, have unequivocally rejected the Third Circuit approach as violative of fundamental comity concerns. The Seventh Circuit persuasively stated:

[T]he Indiana Supreme Court presumably could have chosen to ignore its procedural rule and passed on the merits of the constitutional issue. It cannot be said, however, that that court should be required to ignore its own procedures. "If a petitioner wishes to exhaust his claims, he is expected not only to use the normal avenues of relief but also to present his claims before the courts in a procedurally proper manner according to the rules of the state

courts." [citation omitted]... The exhaustion rule is a rule of comity which recognizes that, while it is necessary for the federal courts to be available to protect the rights of state prisoners, it is also necessary that state courts be permitted to function without undue interference.

Wallace v. Duckworth, 778 F.2d 1215, 1223 (7th Cir. 1985) (emphasis added). Similarly, the Ninth Circuit, when confronted with the identical issue, stated that it "need not find that the Oregon Supreme Court lacked jurisdiction to hear the claim," but only that the procedural posture in which the claim was presented was not a fair opportunity for decision. Kellotat v. Cupp, 719 F.2d 1027, 1031 (9th Cir. 1983). Similar results were reached by the Fifth Circuit, the Eighth Circuit, the Sixth Circuit, the First Circuit, and the Second Circuit.¹³

¹³Brown v. Estelle, 530 F.2d 1280
(Footnote Continued)

At present, applicants in other circuits who default in state court as respondent has will be denied federal review on exhaustion grounds. Respondent, and others like him in the Third Circuit, however, will receive that review. This situation should not be perpetuated.¹⁴

(Footnote Continued)
(5th Cir. 1986); see also, Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982); William v. Wyrick, 763 F.2d 363 (8th Cir. 1985); see also, Diamond v. Wyrick, 757 F.2d 192 (8th Cir. 1985); Bandy v. United States, 628 F.2d 935 (6th Cir. 1980); Dickerson v. Walsh, 750 F.2d 150 (1st Cir. 1984); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981).

¹⁴ Adding further confusion to Third Circuit habeas corpus litigation, an intra-circuit conflict has arisen; a recent panel decision dismissed a petition for further state development of an ineffective assistance of counsel claim. O'Halloran v. Ryan, 835 F.2d 506 (3d Cir. 1987). While the O'Halloran holding accords with the congressional mandate of 28 U.S.C. §2254(c), application of the Chaussard exhaustion rule produces the contrary result reached by the panel in the present case. Such divergent results engender confusion and foster dissimilar

(Footnote Continued)

The inequity in the administration of habeas corpus litigation resulting from the Third Circuit's approach requires the immediate attention of this Court. It is equally imperative that this Court grant review to rectify the impermissible imbalance of sovereign interests imposed by the Third Circuit's erroneous ruling.


(Footnote Continued)

application of the exhaustion doctrine at the district court level. This Court's review is thus also required to reconcile the intra-circuit conflict and ensure its uniformity of decisions.

CONCLUSION

For all the foregoing reasons,
the Commonwealth of Pennsylvania, through
the named petitioners, respectfully
requests that a Writ of Certiorari issue
to review the decision below.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1247

PEOPLES, MICHAEL,

Appellant

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE
ATTORNEY GENERAL OF THE STATE OF PENNSYL-
VANIA AND THE DISTRICT ATTORNEY
OF PHILADELPHIA COUNTY

Appeal From the United States District
Court For the Eastern District of
Pennsylvania D.C. Civil No. 86-4458

Argued December 7, 1987

Before: GREENBERG, SCIRICA, and HUNTER,
Circuit Judges

Opinion filed December 30, 1987

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OPINION OF THE COURT

PER CURIAM:

1. Appellant Michael Peoples seeks a writ of habeas corpus. The District Court, adopting the report and recommendation of a U.S. Magistrate, dismissed his petition on the grounds that Peoples had not exhausted his state remedies.

I. BACKGROUND

2. Following a jury trial in the Philadelphia Court of Common Pleas in 1981, Peoples was convicted of arson, endangering persons, aggravated assault and robbery. His post-verdict motions for a new trial were denied, and the conviction was affirmed by the Pennsylvania Superior Court in September, 1983. The following month, Peoples filed in the Pennsylvania Supreme Court a pro se "Petition for Allowance to File Appeal to Review Errors of the Superior Court with

Appointment of New Counsel" ("pro se petition"). The Supreme Court granted the request for appointment of counsel "to assist [Peoples] in filing a Petition for Allowance of Appeal," but did not discuss the merits of the claims raised in the pro se petition. Appendix at 170a. Peoples's new counsel filed a Petition for Allowance of Appeal ("counseled petition") in June, 1985. The counseled petition was denied without opinion on November 4, 1985.

3. Prior to the denial of allocatur in 1985, Peoples had filed two petitions for writ of habeas corpus in federal District Court, each of which was denied for failure to exhaust state remedies. Peoples filed the current petition for habeas corpus on July 28, 1986. The matter was referred to Magistrate Naythons, and the Philadelphia District Attorney filed a response contending that Peoples had not exhausted his state

remedies. In his pro se reply to the response, Peoples directed the court's attention to his pro se petition for allocatur, and argued that that petition, considered with other relevant documents, showed he had satisfied the exhaustion requirement.

4. The Magistrate's Report and Recommendation that the writ be denied was filed on April 2, 1987. The report, which made reference to the counseled petition for allocatur but did not mention the pro se petition, stated that Peoples had not exhausted state remedies. In particular, the Magistrate referred to several claims that were missing from the counseled petition for allocatur as the basis for finding a lack of exhaustion. The parties are in dispute as to whether these claims are sufficiently raised in the pro se petition which the Magistrate did not consider.

5. The District Court approved and adopted the Magistrate's report and recommendation and denied the writ on April 17, 1987, three days before People's deadline for filing objections to the report. Peoples timely filed his objections on April 20. The court filed a new order the following day which denied the objections to the Magistrate's report and again denied the petition for writ of habeas corpus. Peoples filed a petition for certificate of probable cause to appeal to this court on April 28, 1987. This court granted the request on June 3, 1987. We will now reverse based upon our recent decision in Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir. 1987). In Chaussard, this court found that a prisoner had satisfied the exhaustion requirement by filing a pro se petition for allocatur in the Supreme Court.

II. DISCUSSION

6. Peoples raises two claims on appeal. He first claims that he has sufficiently exhausted state court remedies for purposes of the federal habeas corpus statute, 28 U.S.C. §2254 (1982). Second, Peoples asserts that if he is found not to have exhausted his state court remedies, his failure should be excused because further resort to the state courts would be futile.

7. The second issue is easily disposed of. He bases this assertion on the fact that "the inordinate delay which would be required to exhaust those remedies would render those remedies inadequate." Appellant's brief at 38. While it is true that exhaustion is not required where the attempt would be futile, see 28 U.S.C. §2254(b), there is simply no basis for this court to rule as a matter of law that the state courts of Pennsylvania are

unable to afford adequate relief because of inordinate delay.

8. Turning to the question of whether all the claims are exhausted, we first note that in this case our review is plenary, Chaussard, 816 F.2d at 927. In his current petition for habeas, Peoples asserts that he was denied due process under several theories, each of which has a slightly different procedural history in the state courts:

1. The prosecutor questioned the defendant on unrelated crimes.
2. Defendant's denial (sic) for a non-jury trial was denied.
3. Identification procedures were unnecessarily suggestive.
4. Peoples had ineffective assistance of counsel, in that counsel failed to:
 - a. file motions to suppress evidence obtained through an illegal arrest, search and seizure; and
 - b. object to the admission of unrelated crimes.

Each of these claims must be exhausted in order for the petition to satisfy the requirements of 28 U.S.C. §2254(b). See Rose v. Lundy, 455 U.S. 509 (1982); Chaussard, 816 F.2d at 927. The question of whether each has been exhausted is therefore discussed individually below. Before turning to the individual claims, however, there is a preliminary question as to whether the pro se allocatur petition should be included in the procedural history of any claim.

A. The Pro Se Allocatur Petition.

9. A petition for allocatur to the state Supreme Court can suffice to satisfy the exhaustion requirement. Chaussard, supra. In this case, as in Chaussard, there were two different allocatur petitions: the pro se petition and the counseled one. The difference between this case and Chaussard is that, unlike the latter case, the pro se petition in this

case was captioned "Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of Counsel."

See Appendix at 132a-40a. Appellees argue that this petition should not be considered for purposes of exhaustion because it was a request for counsel rather than for relief; as such, it did not give the Supreme Court a fair opportunity to review the substantive claims. Appellees' brief at 10-11.

10. The proper characterization of the pro se petition is a close question on which there seems to be no controlling law. However, it seems that the Supreme Court had just as much discretion to review the merits of the petition here as it did in the Chaussard case. To begin with, the petition looks much more like a request for allocatur than a request for counsel: with the exception of the tail-end of the caption and part of the final

sentence, the petition is concerned entirely with allocatur. In fact, the relief requested in the petition is for both the grant of allocatur and the appointment of counsel. Appendix at 138a. Thus, the closest procedural analogy to the Supreme Court's disposition of the petition would be a dismissal without prejudice: Peoples was granted an order for the appointment of counsel, but was told that his request for allocatur must be refiled within thirty days. While this might have been the most prudential course for the Supreme Court, it was within their discretion to grant relief on the merits. That they chose not to exercise that discretion should not keep Peoples out of federal court.

11. Admittedly, this argument may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement. The Pennsylvania

Supreme Court exercised its discretion in such a way as to avoid deciding an issue before it was presented by counsel; once a counseled petition had been filed, it would have been improper to consider the claims raised in the pro se petition but not the counseled one. And yet those choices seem sufficient to allow a federal court to hear the merits of Peoples's petition. It may be argued that this result is inconsistent with the principle of comity, but the course charged out by Chaussard compels our decision here. This court's prior decision in Chaussard makes it impossible for us now to ignore the pro se allocatur petition in this case.

B. Exhaustion of Specific Claims.

1. Improper Cross Examination.

12. This claim was raised in the post-trial motions, in the brief before the Superior Court, and in the pro se petition for allocatur; it was not raised

in the counseled petition. Given our holding that the pro se petition is properly considered part of the procedural history of this claim, the exhaustion requirement is satisfied.

2. Denial of Non-Jury Trial.

13. This claim was raised in the post-trial motions, but not in the brief before the Superior Court. The claim was resurrected in the pro se petition for allocatur but then left out of the counseled claim. Assuming again that the pro se petition is relevant, the exhaustion requirement may be deemed satisfied under Chaussard. Since the Supreme Court gave no indication that it would refuse to hear the non-jury trial claims because of the procedural defect of not raising it before the Superior Court, Chaussard would suggest that inclusion of the claim in the petition for allocatur is sufficient. See

Klein v. Harris, 667 F.2d 274, 284-85 (2d Cir. 1981).

3. Tainted Identification Procedures.

14. This had essentially the same procedural history as the first claim about the improper cross-examination, and should be considered exhausted for the same reasons.

4. Ineffective Assistance of Counsel.

15. Peoples raised two ineffective claims in his habeas petition. The first stated that he had been denied effective assistance because his attorney had failed to seek suppression of the fruits of the arrest. Appellant's brief to this court asserts that his claim was made for the first time "in terms of the ineffective assistance of appellate counsel in the counselled Petition" Appellant's brief at 37 (citing Appendix at 41a-42a). This would not support a finding of exhaustion, since a claim that trial counsel was

ineffective is not the same as a claim that appellate counsel failed to assert viable theory on appeal. However, a fair reading of the pro se allocatur petition, Appendix at 136a-37a, shows that Peoples did raise the ineffectiveness of trial counsel in that document. Thus under the reasoning set out above, this claim has been exhausted.

16. The second ineffectiveness claim, that counsel failed to object to admission of unrelated crimes, was raised only in the pro se petition; it was not mentioned in the post-trial motions, the brief before the Superior Court, or the counseled petition. Thus, like all the other claims, the issue of exhaustion turns on whether the pro se petition is a relevant document; since we hold that it is, this claim has been exhausted.

CONCLUSION

17. Because we find that appellant Peoples has satisfied the exhaustion requirement of 28 U.S.C. §2254, we will reverse the decision of the District Court and remand for a hearing on the merits of the habeas petition.

TO THE CLERK

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1247

PEOPLES, MICHAEL,

Appellant

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA and THE DISTRICT ATTORNEY
OF PHILADELPHIA COUNTY

D.C. Civ. No. 86-4458

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ, WEIS,
HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON,
MANSMANN, GREENBERG, SCIRICA, COWEN, and
HUNTER, Circuit Judges.

The petition for rehearing filed
by appellees in the above-entitled case

having been submitted to the judges who participated in the decision of this court and to the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

Circuit Judge

Dated: January 25, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PEOPLES : CIVIL ACTION

VS. :

THOMAS FULCOMER, :
SUPERINTENDENT AND THE :
DISTRICT ATTORNEY FOR :
PHILADELPHIA COUNTY :

AND :

THE ATTORNEY GENERAL OF :
THE STATE OF PENNSYLVANIA : NO. 86-4458

ORDER

MARVIN KATZ, J.

NOW, this 17th day of April,
1987, after careful and independent
consideration of relator's petition for a
writ of habeas corpus and after review of
the Report and Recommendation of the
United States Magistrate, it is ORDERED
that:

1. The Report and Recommendation is
Approved and Adopted.

2. The petition for writ of habeas corpus is Denied and Dismissed without prejudice for failure to exhaust state remedies.

3. Petitioner's motion for state court trial transcripts is Denied.*

4. There is no probable cause for appeal.

 /s/
MARVIN KATZ, J.

*Petitioner may renew this request if he files P.C.H.A. proceedings before the State Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PEOPLES : CIVIL ACTION

V. :

THOMAS FULCOMER, :
SUPERINTENDENT AND THE :
DISTRICT ATTORNEY FOR :
PHILADELPHIA COUNTY :

and :

THE ATTORNEY GENERAL OF :
THE STATE OF PENNSYLVANIA : NO. 86-4458

ORDER

AND NOW, this 21st day of April,
1987, it is hereby ORDERED that the
petition for writ of habeas corpus is
DENIED and DISMISSED without prejudice for
failure to exhaust state court remedies.
The petitioner's objections to Magistrate
Naython's Report and Recommendation are
also DENIED. It is further ORDERED that
petitioner's motion for this Court to
provide him with a complete copy of the
state court trial transcripts in

Commonwealth v. Peoples is DENIED. There
is no probable cause for appeal.

BY THE COURT:

MARVIN KATZ, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PEOPLES : CIVIL ACTION

VS. :

THOMAS FULCOMER, :
SUPERINTENDENT AND THE :
DISTRICT ATTORNEY FOR :
PHILADELPHIA COUNTY :

AND :

THE ATTORNEY GENERAL OF :
THE STATE OF PENNSYLVANIA : NO. 86-4458

REPORT - RECOMMENDATION

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE APRIL 1, 1987

Michael Peoples, an inmate currently incarcerated at the State Correctional Institution in Huntingdon, Pennsylvania has filed a pro se petition for a writ of habeas corpus. Petitioner was convicted of arson endangering persons, aggravated assault, and robbery following a jury trial before the Honorable James T. McDermott on January 16, 1981. On April 28, 1981, petitioner was

sentenced to a total of fifteen to forty (15-40) years imprisonment with a concurrent ten year probation.

On June 8, 1982, Judge Charles P. Mirarchi, Jr., of the Court of Common Pleas filed a written opinion concerning the denial of petitioner's post-trial motions, following the election of the Honorable James T. McDermott to the Pennsylvania Supreme Court in November of 1981. Among petitioner's post-trial motions was a claim that he was improperly denied a bench trial. This claim was never appealed after the initial denial by Judge Mirarchi.

Petitioner filed a direct appeal to the Pennsylvania Superior Court on May 11, 1983. The Superior Court affirmed the judgment of sentence on September 16, 1983. Commonwealth v. Peoples, 466 A.2d 720 (Pa. Super. 1983). The Superior Court rejected petitioner's claim that the

Suppression Court erred in failing to suppress identification testimony. Petitioner never appealed this ruling by the Superior Court.

On June 7, 1985, petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court. Among the issues raised in this petition, was whether appellant counsel was ineffective for failing to raise in his appeal that trial counsel was ineffective in failing to preserve the issue; that the prosecutor committed reversible error in cross-examining petitioner as to his prior criminal record in violation of 42 Pa.C.S.A. §5918. Petitioner's Allocatur appeal was denied on November 4, 1985.¹

¹This is petitioner's third petition for a writ of habeas corpus. By Order dated December 5, 1984, petitioner's first petition was denied for failure to exhaust
(Footnote Continued)

DISCUSSION

A petition for a writ of habeas corpus by a state prisoner will not be entertained by a federal habeas corpus court unless available state court remedies have been exhausted. 28 U.S.C. §2254(b), (c); Rose v. Lundy, 455 U.S. 509 (1982). Absent highly unusual circumstances the Court may not consider the merits of petitioner's claims unless he has exhausted his remedies with respect to each. Patterson v. Cuyler, 729 F.2d 925, 929 (3d Cir. 1984); Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982), cert. denied,

(Footnote Continued)
state court remedies, Civil Action No. 84-4061, following this U.S. Magistrate's Report and Recommendation of November 15, 1984. Petitioner's second petition for a writ of habeas corpus was denied for failure to exhaust state court remedies on July 15, 1985 when the District Court approved and adopted this U.S. Magistrate's Report and Recommendation of June 27, 1985, Civil Action No. 85-2031.

459 U.S. 1115 (1983). The exhaustion doctrine is designed primarily to protect the state court's role in enforcement of federal law and to prevent disruption of state judicial proceedings. Rose, 455 U.S. at 518; Slotnick v. O'Lone, 683 F.2d 60 (3d Cir. 1982), cert. denied, 459 U.S. 1211 (1983).

A federal habeas corpus court will not hear a constitutional claim for the first time unless petitioner demonstrates cause for the failure to properly present the claim to the state courts and prejudice resulting therefrom. Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977), reh. denied, 434 U.S. 880 (1977). "An exception [to the exhaustion requirement] is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain

relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981).

Petitioner's first claim of prosecutorial misconduct, is based upon the prosecutor's cross-examination of petitioner as to his prior criminal record. Petitioner relies on 42 Pa.C.S.A. §5918 as support for his claim. The only opportunity the Pennsylvania Court's were given to address this claim was on petitioner's Allocatur appeal to the Pennsylvania Supreme Court. In that appeal petitioner alleged ineffectiveness of appellate counsel for failing to raise this issue and for not raising trial counsel's ineffectiveness in failing to preserve this issue.

The Pennsylvania Supreme Court has refused to consider as finally litigated on its merits, an issue raised solely in an allocatur appeal. Commonwealth v. Tarver, 493 Pa. 320, 426, A.2d

569 (1981). An issue not raised in the lower courts is considered waived and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a).

Since the record is void of any indication that the Pennsylvania Courts were properly presented with this issue and ruled on petitioner's claim of prosecutorial misconduct, this U.S. Magistrate cannot conclude that this claim has been exhausted. The procedurally correct way for petitioner to assert the issue of ineffectiveness of counsel and prosecutorial misconduct which has not been previously litigated is to file a petition for relief under Pennsylvania's Post Conviction Hearing Act, 42 Pa.C.S.A. §§9541 et seq.

Petitioner's second claim is that he was unconstitutionally denied a bench trial. While this claim was raised in post-verdict motions, it was never

brought before an appellate court for review. Petitioner must show cause for the failure to present this claim to the state courts and prejudice resulting therefrom, before a federal habeas court will consider this claim. Wainwright, 433 U.S. 72.

Petitioner may assert ineffectiveness of counsel as the cause for his failure to properly present claims to the state courts. However, while these grounds for relief remain open it would be improper for this federal habeas court to consider petitioner's ineffectiveness of counsel claim to show cause for a procedural default. "If a petitioner could raise his ineffectiveness claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim, for

which state court review might still be available. Murray v. Carrier, ____ U.S. ____, 106 S.Ct. 2639, 2646 (1986).

Petitioner asserts that his identification in court was not admissible as it was a result of illegal and suggestive police procedures. While this claim was raised and denied on its merits before the Pennsylvania Superior Court, it was abandoned on allocatur. Consistent with Wainwright, supra the failure to preserve the claim bars federal consideration absent a showing of cause for the default and prejudice resulting therefrom. Petitioner has not demonstrated such to this Court. If petitioner intends to assert ineffectiveness of counsel as "cause," he must return to the State Courts.

Petitioner also claims that trial counsel was ineffective for failing to file a motion to suppress evidence

obtained by an illegal arrest, and that appellate counsel was ineffective in asserting it. These claims were raised for the first time in petitioner's allocatur petition to the Supreme Court. Since this U.S. Magistrate cannot conclude that the Pennsylvania Supreme Court did or would consider the merits of such a claim presented for the first time in an allocatur petition, as previously discussed, these claims cannot be considered by this Court. Petitioner must assert these claims in an action under the Post Conviction Hearing Act.

Petitioner's final claim of trial counsel's ineffectiveness, for failure to object to evidence that petitioner changed his appearance before a line-up, was raised for the first time in this petition for habeas corpus. Therefore, it is clear that petitioner failed to exhaust his state court remedies with

respect to this issue. See, Rose, supra;
28 U.S.C. §2254(b).

Petitioner has also filed a request for this Court to provide him with the trial transcripts in Commonwealth v. Peoples. Petitioner has failed to state any reasons for such other than his need to reply to respondent's answers to the habeas corpus petition.

The touchstone of an indigent's motion for a transcript are need and relevance. United States ex rel. Williams v. State of Delaware, et al., 427 F.Supp. 72, 76 (D.Del.1976). Indigents are not entitled to a transcript of the trial proceedings for use in habeas corpus matters without a showing of need. Towler v. Peyton, 303 F.Supp. 581, 583 (W.D.Va. 1969); citing United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964); United States v. Glass, 317 F.2d 200 (4th Cir. 1963).
Petitioner has not demonstrated the need

for the trial transcripts, especially in light of this Court's findings that petitioner failed to exhaust his existing state remedies in claims raised in his habeas petition. It is noted that petitioner's grounds raised in his habeas corpus petition allege no deprivation of requested transcripts or errors contained in the records; indeed he makes no reference to the need for the transcripts at any time.

Accordingly, this United States Magistrate makes the following.

RECOMMENDATION

NOW, this 2nd day of April, 1987, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be Denied and Dismissed without prejudice for failure to exhaust state court remedies. IT IS FURTHER RECOMMENDED that petitioner's motion for this Court to provide him with a complete copy of the state court

trial transcripts in Commonwealth Peoples
be Denied. There is no probable cause for
appeal.

 /s/
EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE